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In the Supreme Court of the United States

OCTOBER TERM, 1961

LAVERNE W. SIMPSON, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court convened pursuant to 28 U.S.C. 2282 and 2325. The judgment dismissed a complaint to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission directing the appellant to cease and desist from con-

ducting certain motor carrier operations found to be unauthorized by his common carrier certificates.

Appellant holds certificates of public convenience and necessity authorizing him to transport structural steel, brick, and heating equipment between various points in Iowa, and between points in Iowa and six other states (J. St. 3a). In 1955, the Commission instituted an investigation under Section 206(a) of the Interstate Commerce Act, 49 U.S.C. 306(a), to determine whether appellant was transporting certain commodities not authorized by his certificates. After full administrative proceedings (described in the district court opinion, J. St. 3a–5a), the Commission held that the authority in appellant's certificates to transport "structural steel" does not cover sixteen enumerated iron and steel items which appellant was transporting.[1]

The Commission interpreted the certificates to authorize carriage of a specific group of rolled steels identified as "structural steel" according to the accepted trade and industrial usage of the term. It rejected appellant's contention that, in determining whether particular items were "structural steel,"

[1] The items, transportation of which was held to be unauthorized, are (J. St. 27a): (1) steel forgings, (2) steel sheets and strips, (3) steel lathing and grounds, (4) wrought pipe, (5) iron and steel bolts and nuts, (6) steel washers, (7) steel forms used and reused for concrete construction, (8) steel tubing, (9) steel rings, rough, (10) reinforcing bars, (11) steel stampings, (12) steel bars, round and flat, (13) steel wire, (14) steel rivets, (15) steel welding rods, and (16) steel screws. The Commission held that the certificate authorized appellant to carry steel tees, zees and angles, steel channels and steel beams (J. St. 23a).

their intended use or application was controlling, *i.e.*, that steel items were "structural" if they were to be incorporated in the framework of a structure. The Commission reaffirmed its ruling in *Carroll Trucking Company, Interpretation of Certificate*, 62 M.C.C. 348, that "under established trade and industrial usage, the term 'structural' refers to a group of rolled steels identified as such regardless of their intended use or application." It pointed out (J. St. 22a):

> * * * If the term "structural steel" is given the broad meaning contended for by respondent, it could conceivably be interpreted to include the transportation of practically every kind of steel. This would be in direct conflict with the limiting adjective "structural," the use of which was clearly intended to restrict the character of the steel authorized to be transported. * * *

The Commission noted (J. St. 25a–26a) that its interpretation accorded with the dictionary definition of "structural steel" and with technical publications and information sources known throughout the industry, of which it took official notice. The Commission rejected expert testimony that certain of the products carried by appellant were structural steel, on the ground that this testimony was based upon the intended use of the products (J. St. 24a). The Commission concluded (J. St. 27a) that "the term 'structural steel' as used in respondent's certificates has a trade and industry meaning which does not embrace the iron and steel items enumerated in our findings."

The district court unanimously upheld the Commission's interpretation of appellant's certificates as covering only these products which are considered to be structural steel under accepted trade and industry usage. It ruled (J. St. 10a) that the Commission was justified in relying upon its prior decision in the *Carroll* case in construing appellant's certificates, since "it seems perfectly reasonable for the Commission, after due consideration, to adopt what it considers to be a reasonable construction of a particular commodity description and to apply that construction more or less uniformly thereafter in the interpretation of like descriptions." The court also rejected appellant's contentions that the Commission, under the guise of interpretation, was modifying or partially revoking his certificates (J. St. 11a–12a); and that the Commission was estopped from challenging his right to transport the commodities involved because he and his predecessors in interest had been transporting them for a long period pursuant to tariffs on file with the Commission (J. St. 12a–15a).

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. It involves only the meaning of a narrow technical term in appellant's certificates of public convenience and necessity, and the district correctly upheld the Commission's interpretation of its own certificates.

1. The interpretation of a certificate issued by the Commission is primarily a question for that agency (see *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171), and its interpretation "is controlling on

the courts unless clearly erroneous." *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558. *Sims Motor Transport Lines, Inc.* v. *United States*, 183 F. Supp. 113 (N.D. Ill.), affirmed, 362 U.S. 637. In the present case, the district court correctly upheld the Commission's interpretation of its certificates on the ground that it had a "factual and legal" basis and was not "arbitrary, capricious, or clearly erroneous" (J. St. 15a).

As the court below stated, the Commission's decision in the present case follows its prior decision in the *Carroll* case, in which the term "structural steel" was held to mean a certain group of rolled steels identified as such by "established trade and industrial usage". The Commission's view of the governing trade usage is supported by technical and trade publications, and by the dictionary definition. The district court noted that the interpretation which the Commission adopted in the *Carroll* case was based upon an extensive investigation (see 62 M.C.C. at 350), and the court held that since this interpretation had a "rational basis," the Commission properly relied upon it here.

The Commission is, of course, required to give consideration to trade and industry meaning of terms (*Black* v. *Interstate Commerce Commission*, 167 F. 2d 825 (C.A. 5), certiorari denied, 335 U.S. 818). The Commission was fully justified in relying upon its interpretation of the trade meaning of the term "structural steel" in the earlier *Carroll* case, since such reliance is one way in which the agency draws upon "its own accumulative experience in reaching

a decision" upon the scope of certificates. *Sims Motor Transport Lines, Inc.* v. *United States*, 183 F. Supp. 113, 119 (N.D. Ill.), affirmed, 362 U.S. 637. As the court below noted, "[t]o require that each case be decided solely upon the weight of the evidence produced in that particular proceeding would greatly impair uniformity in the construction of such certificates" (J. St. 10a).

2. There is no substance to appellant's claim that the action of the Commission amounts to a modification and partial revocation of his certificates. The interpretation of appellant's certificates is "simply a definitive declaration of what rights existed from the very beginning under the permit" and "cannot be equated with modification * * * unless found to be clearly erroneous" (*Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. at 558–559 fn. 4). Here, as noted, the Commission's interpretation was fully justified.

If, as appellant claims, its certificates do not accurately reflect the scope of the "grandfather" operations (by appellant's predecessors in interest) upon which it is based, appellant's "recourse is to petition the Commission to reopen the grandfather proceedings * * *. Such a contention is no answer to the present charge of permit violation, since the permit cannot be collaterally attacked" (*Nelson, supra*, 355 U.S. at 561–562). Appellant, of course, may at any time apply to the Commission to reopen the grandfather proceedings.

3. Nor is there any basis for appellant's attempt to invoke the doctrine of laches or estoppel against the

Commission, on the ground that, under published and filed tariffs, appellant and his predecessors in interest had been transporting the commodities involved for many years. In the first place, laches or estoppel may not be invoked against the government. *United States* v. *Summerlin*, 310 U.S. 414; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380. Moreover, as the Commission's division 1 pointed out in this case (73 M.C.C. 75, 78), there is no duty upon the Commission to review tariffs at the time of filing, in order to determine whether all of the numerous items embraced in such tariffs are included in the commodity descriptions in the carriers' certificates, and it would be "impracticable" and "virtually impossible" to do so. The district court agreed, stating that the Commission "is not estopped from later making an interpretation such as the present one" which is necessary for the purposes of enforcing Section 206(a) of the Act, 49 U.S.C. section 306(a). "To hold otherwise," the court noted, "would be to place an undue burden of cross-reference upon the Commission and would create a situation whereby the transportation of unauthorized commodities over a period of years would eventually render such transportation legal" (J.S. 14a).

Appellant's argument (J. St. 15–16) that the Interstate Commerce Act is unconstitutional if it authorizes the Commission to prohibit appellant's unauthorized operations which he has been conducting for a long time is, as the district court stated (J. St. 15a), but another formulation of his laches and estoppel contentions. Since appellant did not raise his constitu-

tional claim before the agency, it is not open to him on judicial review. Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37; *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *Todd* v. *Securities and Exchange Commission*, 137 F. 2d 475, 478 (C.A. 6). In any event, as the district court held (J. St. 15a), the argument in this form is subject to the same infirmities as when phrased in terms of laches and estoppel, and "must be rejected in part for the same reasons." Appellant was not denied any constitutional rights when he was directed to terminate his unauthorized operations.[2]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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[2] As the district court noted (J. St. 15a), appellant could always have sought an interpretation of his certificates by the Commission, if he had doubt as to their meaning.

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